No. _____

In The

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

KURTH RANCH; KURTH HALLEY CATTLE COMPANY; RICHARD M. and JUDITH KURTH, husband and wife; DOUGLAS M. and RHONDA I. KURTH, husband and wife; CLAYTON H. and CINDY K. HALLEY, husband and wife; ROBERT G. DRUMMOND, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PAUL VAN TRICHT*
Special Assistant Attorney General
Office of Legal Affairs
Department of Revenue of the State of Montana
P.O. Box 202701
Helena, Montana 59620-2701
(406) 444-2460

Attorney for Petitioner, Department of Revenue of the State of Montana

**Counsel of Record*

July 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In direct conflict with a prior decision of the Montana Supreme Court, the court of appeals held that a tax assessment under the Montana Dangerous Drug Tax violated the double jeopardy provisions of the United States Constitution.

The question presented is:

Can assessment of a state tax on the possession and storage of dangerous drugs, imposed separate and apart from any criminal penalty, violate the double jeopardy prohibitions of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993) and is reprinted in the Appendix at 1. The opinion of the district court, *Drummond v. Dept. of Revenue*, No. CV-90-084-PGH, 1991 WL 365065 (D. Mont., April 23, 1991) is unreported, and is reprinted in the Appendix at 13. The opinion of the bankruptcy court is reported in *In re Kurth Ranch*, 145 B.R. 61 (Bankr. D. Mont., May 8, 1990), and is reprinted in the Appendix at 24.

The opinion of the Montana Supreme Court, which conflicts with the decision of the court below, is reported in *Sorenson v. Montana Dep't of Revenue*, 254 Mont. 61, 836 P.2d 29 (1992) and is reprinted in the Appendix at 62.

JURISDICTION

The decision of the court of appeals was entered February 26, 1993. A Petition for Rehearing with Suggestion for En Banc Rehearing was filed pursuant to Rules 35 and 40, Fed. R. App. P. That petition was treated as timely and denied on May 3, 1993. The order denying rehearing is reprinted in the Appendix at 78. The petition also was treated as timely by the clerk of this Court. Appendix at 80. This Petition for Certiorari was filed within 90 days of the date of denial of the petition for rehearing. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the constitutionality of a tax assessment under the Montana Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 through 123 (1987). This tax is on the possession or storage of dangerous drugs including marijuana. The part of the tax at issue provides:

> "[T]he tax on possession and storage of dangerous drugs is the greater of: (a) 10% of the assessed market value of the drugs, as determined by the [Montana Revenue] department; or (b)(i) $100 per ounce of marijuana . . . "

The entire dangerous drug tax is set out in the Appendix at 82.

The provision of the United States Constitution involved in this case is the double jeopardy provision of the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment. The Fifth Amendment is set forth in full in the Appendix at 88.

STATEMENT OF THE CASE

The extended Kurth family was in the marijuana growing business in central Montana. In October 1987 this operation was discovered and 2,155 marijuana plants, 1,881 ounces of harvested marijuana and several gallons of marijuana derivatives were seized by law enforcement officials. Petitioner Montana Department of Revenue ("Department") assessed the Kurths under the Montana Dangerous Drug Tax Act.

In July 1988 the Kurths pled guilty to state criminal charges and were sentenced in state court. The Kurths then filed voluntary bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, *et seq.* (1985).[1] That bankruptcy later was converted to a Chapter 7 bankruptcy. The Department filed a proof of claim for the drug tax assessment. The Department's claim was challenged by the Kurths and the trustee in bankruptcy. Jurisdiction of the bankruptcy court over this dispute was under the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* and the Judiciary Act, 28 U.S.C. 281 *et seq.* (the "Bankruptcy Amendments and Federal Judgeship Act of 1984" as amended).

Following a bench trial in the adversary proceeding, the bankruptcy court found $208,105 due in drug tax.[2] However, relying on this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), the bankruptcy court determined that the tax assessment was a "second punishment" for conduct (possessing marijuana) for which the Kurths had previously been criminally punished, and that the tax assessment violated the double jeopardy clause of the Fifth Amendment. The bankruptcy court therefore denied the Department's claim. (App. 24).

The Department appealed the decision of the bankruptcy court to the United States District Court for the District of Montana under its appellate jurisdiction, 28

---

[1] The debtors included the individual members of the Kurth family. The Kurth Ranch and Kurth Halley Cattle Company were family owned corporations.

[2] At this time, there remains over $120,000 in this estate after payment of the trustee's attorney's fees to date.

U.S.C. § 158 (1988). The district court affirmed the decision of the bankruptcy court. (App. 13). The Department appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the decision of both the bankruptcy court and the district court. (App. 1). The court of appeals' appellate jurisdiction is found in 28 U.S.C. § 158(c) & (d) (1988). The Department is petitioning for review of the decision of the court of appeals.

ARGUMENT

A. The Decision of the Ninth Circuit Directly And Irreconcilably Conflicts with a Decision of the Montana Supreme Court.

Montana has a tax on the possession or storage of dangerous drugs including marijuana. Mont. Code Ann. §§ 15-25-101, *et seq.* (1987) (App. 80). The tax on marijuana is $100 per ounce. In the case of *Sorenson v. Montana Dep't of Revenue*, 254 Mont. 61, 64-68, 836 P.2d 29, 30-33 (1992) (App. 62), the Montana Supreme Court held that the tax of $100 per ounce on marijuana was an excise tax and not a punishment, expressly rejecting the rationale for the decisions of the bankruptcy court and the district court in this case.

Like the Kurths, the taxpayers in *Sorenson* were convicted of criminal violations of Montana's dangerous drug law for possessing drugs, including marijuana, and were assessed taxes under the Montana Dangerous Drug Tax. The Montana Supreme Court, applying this Court's holdings in *United States v. Ward*, 448 U.S. 242 (1980) and

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), held that the tax was an excise tax and not a second form of criminal punishment. 836 P.2d at 31-32 (App. 62). The Montana court then rejected the argument accepted by the court of appeals in this case, distinguishing *Halper* because that "rare" case, 490 U.S. at 449, involved a fixed penalty rather than an excise tax. When it decided *Sorenson*, the Montana Supreme Court was fully aware of the contrary decisions by both the bankruptcy court and the federal district court in this case. 836 P.2d at 34 (Hunt, J., dissenting) (App. 62).

At issue in this case is a similar tax assessment of $100 an ounce on marijuana under the Montana Dangerous Drug Tax. Contrary to the Montana Supreme Court, the court of appeals held that Montana's tax on marijuana was a punishment and "the tax assessment levie[d] by [the Montana Dept. of] Revenue in this case constitutes an impermissible second punishment in violation of the federal Constitution's Double Jeopardy Clause." (App. 11-12). The court of appeals relied on the *Halper* decision but did not distinguish its decision from that of the Montana Supreme Court in *Sorenson*.[3] Indeed,

---

[3] *Halper* and similar subsequent decisions by this Court are not relevant to the issue presented in this petition. In *Halper* there was no question that the law at issue was a penalty. The federal law in question, 31 U.S.C. §§ 3729-3731 (the False Claims Act) expressly provided a "civil penalty of $2,000" for each false claim. Similarly, *Austin v. United States*, ___U.S.___, 61 U.S.L.W. 4811 (U.S. June 28, 1993) is not relevant to this petition. In *Austin* the issue was whether the excessive fines clause of the Eighth Amendment applied to statutory forfeitures of property. In this case the central issue is whether the Montana tax on marijuana is a "penalty" or "punishment" for purposes of the double

during its discussion of *Sorenson* the court of appeals expressly disagreed with the Montana Supreme Court's analysis. In a footnote, the court of appeals stated:

> In fact, the [Montana Supreme] [C]ourt did not believe *Halper* was implicated at all: "a tax requires no proof of remedial costs on the part of the state." [836 P.2d 29, at 33]. The [Montana Supreme] Court also noted that its tax was "comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act . . . As we have noted, this ignores the particularized double jeopardy inquiry required under *Halper*.

986 F.2d at 1312, n.2. (App. 11).

The Montana Supreme Court held the tax on marijuana is not a penalty and that there is no need to make a showing of remedial costs to enforce the tax. *Sorenson*, 836 P.2d at 33 (App. 72). An assessment under that tax thus does not violate the double jeopardy clause. The court of appeals, in direct conflict, said the tax on marijuana is a penalty or punishment and an assessment under that tax can violate the double jeopardy clause without a showing of "damages" by the government. 986 F.2d at 1312 (App. 11).

This Court has frequently granted the writ to resolve conflicts between a ruling of a court of appeals and a decision of a state supreme court on constitutional issues.

---

jeopardy clause of the Fifth Amendment. **It is the conflict between the Montana Supreme Court and the court of appeals over whether the Montana tax is a punishment or not that is the issue presented in this petition.**

See, e.g., Andresen v. Maryland, 427 U.S. 463, 470 n.5 (1976). The conflict is especially intolerable here, because under the Tax Injunction Act, 28 U.S.C. § 1341 (1988), challenges to the validity of a state tax ordinarily must be resolved in state court proceedings. The Kurths were able to place this issue before the federal courts only because they were involved in a proceeding before the federal bankruptcy court. For taxpayers who are not involved in a bankruptcy, like the taxpayers in *Sorenson*, the Montana Supreme Court's decision governs, while bankrupt taxpayers may seek protection in federal bankruptcy court based on the ruling of the court of appeals in this case.

This Court's certiorari jurisdiction serves to ensure uniformity in the application of the United States Constitution. Unless the court of appeals or the Montana Supreme Court subsequently modifies its position on the Montana tax, the identical issue will be decided differently from case to case merely on the basis of the forum in which the issue is litigated. The Court must grant the writ and review the decision of the court of appeals to secure for Montana taxpayers a uniform application of Fifth Amendment principles to the tax at issue here.

B. The Circuit Court's Decision Conflicts With Decisions of This Court and Other Circuits.

Over twenty years ago the federal government had an excise tax of $100 per ounce on marijuana.[4] That tax

---

[4] In 1950 the marijuana "transfer tax" was codified in the Internal Revenue Code (26 U.S.C. § 2590) (1946 ed.):

was similar to the Montana tax at issue. A number of federal court decisions, including several by this Court, addressed the issue of whether the federal tax on marijuana was a true tax or some type of punishment.

Various federal courts have held the federal tax of $100 per ounce on marijuana was a true tax and not a penalty or punishment. In *United States v. Sanchez*, 340 U.S. 42 (1950), this Court upheld the federal Marijuana Tax Act against a challenge similar to that accepted by the court of appeals. The Court reasoned that the statute had several proper purposes, including raising revenue, and that the Marijuana Tax "di[d] not cease to be valid merely because it regulate[d], discourage[d], or even definitely deter[red] the activities taxed." 340 U.S. at 44. This Court

---

Tax.

(a) Rate – There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers – Upon each transfer to person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others – Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, **$100 per ounce of marijuana or fraction thereof** . . .

This transfer tax was in addition to the marijuana "occupational tax" in section 3230 on "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marijuana . . . " These taxes were last codified as 26 U.S.C. §§ 4741 et seq. (1954). The taxes were repealed in 1971 in Pub.L. 91-513.

further stated that "[t]he tax in question [of $100 per ounce of marijuana] is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect. . . . " 340 U.S. at 45. *See also Minor v. United States*, 396 U.S. 87, 98 (1969) decided with *Buie v. United States*, 396 U.S. 87 (1969).

Two circuit courts of appeal, and the court of claims, following *Sanchez*, upheld the $100 per ounce federal marijuana tax and held the tax was not a penalty: *Frey v. United States*, 558 F.2d 270 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *Simmons v. United States*, 476 F.2d 715 (10th Cir. 1973) (total marijuana tax & interest of $567,393.58); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1973); and *Cancino v. United States*, 451 F.2d 1028 (Ct. Cl., 1971), *cert. denied*, 408 U.S. 925 (1972). The Montana Supreme Court relied upon these federal decisions in *Sorenson*.[5]

The decision of the court of appeals in this case irreconcilably conflicts with these federal decisions. As noted above, the court of appeals dismissed the Montana Supreme Court's reliance on those federal decisions. The court of appeals gave no reason why a federal tax of $100 per ounce on marijuana is a true excise tax, while a state tax of $100 per ounce is a penalty. It did not distinguish its decision from those of other federal courts of appeal. The conflict between the court of appeals' decision here and the decisions of this Court in *Sanchez* and of the fifth

---

[5] These federal decisions were written before *Halper* and therefore, did not analyze the federal marijuana tax under the double jeopardy clause. However, the federal courts did clearly hold that the tax was not a punishment.

and tenth circuits and the court of claims in *Frey, Simmons, Alvero,* and *Cancino,* is grounds for granting the writ in this case.

C. The Ninth Circuit's Decision Conflicts With Decisions of Other State Courts of Highest Appeal.

There are over twenty other states which directly tax marijuana by some tax other than their general sales or income tax. These states are listed in the Appendix at 89. The issue in this case has been before a number of state appellate courts, which have uniformly rejected the analysis adopted by the court of appeals here.

The following decisions have upheld a tax on dangerous drugs and held that assessment of the tax itself did not violate the double jeopardy provision of the federal Constitution under this Court's decision in *Halper*: *Hyatt v. State Dept. of Revenue,* 597 So. 2d 716 (Ala. Civ. App. 1992) (total assessment of $198,000 for 494.5 grams of cocaine); *Birney v. State,* 594 So. 2d 120 (Ala. Civ. App. 1991) (tax of $80,000 on 989 dosage units of LSD); *Harris v. State Dept. of Revenue,* 563 So. 2d 97 (Fla. Dist. Ct. App. 1990); *Rehg v. The Illinois Department of Revenue,* 605 N.E.2d 525 (Ill. 1992); *State v. Berberich,* 811 P.2d 1192 (Kan. 1991); and *State v. Riley,* 166 Wis. 2d 299 (Wis. Ct. App. 1991) (total assessment of $89,816 on 217 grams of cocaine).[6] These decisions were brought to the attention of the federal courts below. The decision of the court of

[6] *Harris* and *Rehg* relied, as the Montana Supreme Court did in *Sorenson,* upon this Court's decision in *Sanchez.*

appeals expressly and directly conflicts with those decisions. This Court should grant the petition to resolve these conflicts.

D. The Decision of the Court Below is of Exceptional Importance Because it will Impact Taxes in Over Twenty Other States.

The court of appeals' decision will affect the administration of the drug taxes in over twenty states (App. 89), and therefore presents a question of national importance. The opinion below also applies the decision of the United States Supreme Court in *Halper* for the first time to state taxes despite this Court's expressed admonition that the *Halper* decision was "a rule for the rare case, where a *fixed-penalty* provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449 (emphasis added).[7]

This Court's decision in *Halper* was expressly confined to "rare" cases. In that decision, this Court did not expand the traditional tests for judging state taxes nor did this Court give federal courts new powers to inquire into the supposed purpose of a state legislature when it

[7] Prior to *Halper,* many observers believed that the double jeopardy prohibitions against multiple punishments did not extend to civil sanctions. Thus, *Halper* has been called a "depart[ure] from fifty years of double jeopardy jurisprudence." Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after United States v. Halper,* 76 Univ. Va. L. Rev. 1251 (1990).

enacted a tax. In a concurring opinion in *Halper*, Justice Kennedy emphasized the limits of that decision:

> Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. *It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.* [Citation omitted] Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name.

Halper, 490 U.S. at 453 (emphasis added). It is respectfully submitted the decision of the court of appeals was the type of broad inquiry "into the subjective purposes" behind the Montana Drug Tax which is clearly inappropriate under *Halper*. The court of appeals' expansive reading of *Halper* warrants review.

CONCLUSION

The decision of the court of appeals is flatly contrary to decisions of the Montana Supreme Court and other state courts of appeal. The conflicts are irreconcilable. The court of appeals' decision also is contrary to decisions of this Court and other federal courts on a similar federal tax on marijuana and expands this Court's decision in *Halper* far beyond its expressed limitations.

Therefore, the Petitioner respectfully urges that the Court grant its Petition for a Writ of Certiorari and

reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

PAUL VAN TRICHT*
Special Assistant Attorney General
Office of Legal Affairs
Department of Revenue of the State of Montana
P.O. Box 202701
Helena, Montana 59620-2701
(406) 444-2460

Attorney for Petitioner, Department of Revenue of the State of Montana
**Counsel of Record*

July 1993